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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-1

JOHN A. CARDIN ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE PROSECUTION FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED WHICH WOULD CONSTITUTE A VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT?

II. WHETHER THE TRIAL JUDGE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT BY FAILING TO GIVE INSTRUCTIONS LIMITING THE PURPOSE FOR WHICH EVIDENCE PERTAINING TO CERTAIN TOBACCO AND A BURNING TRUCK BED SHOULD BE USED?

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OPINION BELOW

The Opinion Below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is correctly set forth in the petitioner's Appendix at pages 1a-2a of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3).

The petitioner premises his Petition for Writ of Certiorari upon the following two contentions: that he was denied his right of due process under the 14th Amendment to the United States Constitution upon the grounds that (1) one of the essential elements of the offense of knowingly receiving stolen property, KRS 433.290, was not established by the prosecution's evidence; and, (2) that the trial judge erred in failing to give instructions limiting the purpose for which certain evidence of other alleged crimes should be used.

(1) In regard to the petitioner's first contention, the precise constitutional question presented by the petitioner, i.e., an alleged error by the trial court which supposedly violated a constitutionally protected right, is raised for the first time in petitioner's petition for writ of certiorari and for this very reason should now be dismissed by this Court. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378 (1935); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932).

As this Court is aware, certiorari jurisdiction does not lie where a substantial federal question is not raised and presented in the state court. *Newsom* v. *Smyth*, 365 U.S. 604 (1961); *Central Vermont Railway Co.* v. *White*, 238 U.S. 507 (1915); *Bothwell* v. *Buckbee-Mears Co.*, 275 U.S. 274 (1927); *Monks* v. *New Jersey*, 398 U.S. 71 (1970); *Edelman* v. *California*, 344 U.S. 357 (1953); *Tacon* v. *Arizona*, 395 U.S. 238 (1969).

Moreover, perusal of the Memorandum Opinion of the Kentucky Court of Appeals reveals that this issue was

decided solely upon adequate, independent, non-federal state grounds. Thus, the petition should be dismissed upon this ground as well. *Missouri Pacific Railroad Co.* v. *Hanna*, 266 U.S. 184 (1924).

Also, Rule 23(1)(f) of this Court requires that a petitioner seeking review by certiorari must specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed were raised. In the instant case, the petitioner has not pointed out nor made reference to the record below which would establish where and the manner in which he presented the federal questions he now raises. Thus, even if the petitioner had raised the federal questions in the courts below, which he did not, his failure to comply with Rule 23(1)(f) forecloses certiorari review by this Court now. After all, "the jurisdiction of this Court to re-examine the final judgment of the state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897).

In any event, the issue now presented by the petitioner does not constitute a substantial federal question and for this reason the petition should be dismissed. *Maryland and Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 390 U.S. 367 (1970).

In addition, this Court has consistently adhered to the self-imposed principle that it will not review a state

court judgment based upon an adequate and independent non-federal ground even if the federal question had been properly raised, which is not the case here. *Berea College* v. *Kentucky,* 211 U.S. 45 (1908). The opinion of the Kentucky Court of Appeals reflects that its decision was based solely upon state grounds and not dependent in any manner, or touching upon, a substantial federal question. For this reason, this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals upon a Petition for Writ of Certiorari since its power over state judgments is to correct them only to the extent that they incorrectly adjudged federal rights. *Herb* v. *Pitcairn,* 324 U.S. 117 (1945); *Dixon* v. *Duffy,* 342 U.S. 33 (1951); *Young* v. *Ragen,* 337 U.S. 235 (1949); *Madden* v. *Kentucky,* 309 U.S. 83 (1940); *Henry* v. *Mississippi,* 379 U.S. 443 (1965). Here, there is no federal question involved.

In fact, this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals since the record does not affirmatively indicate the the federal question now in issue was presented to that court, and that the federal question now raised was not necessary to the determination of the cause before the Kentucky Court of Appeals, and that court did not decide the federal question now raised, and that the decision of the Kentucky Court of Appeals as rendered was given without deciding the federal question now raised by the petitioner. *Southwestern Bell Telephone Company* v. *State of Oklahoma,* 303 U.S. 206 (1938); *People of New York*

ex rel Consolidated Water Company of Utica v. *Maltbee,* 303 U.S. 158 (1938).

Finally, as this Court is aware, certiorari jurisdiction is completely discretionary under Rule 19 and the respondent submits that the petition for writ of certiorari should be dismissed since the issue raised by the petitioner does not arise under such exceptional circumstances that this Court should review the decision of the Kentucky Court of Appeals and, in fact, presents no federal question at all, much less a substantial federal question which would merit the discretionary exercise of this Court's review by certiorari. *Department of Mental Hygiene* v. *Kirchner,* 380 U.S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

(2) The petitioner's second contention, concerning the alleged error on the part of the trial judge in failing to give instructions limiting the purpose for which certain evidence of alleged other crimes should be used, was not couched in terms of a denial of the petitioner's right to due process of law under the 14th Amendment to the United States Constitution when presented on appeal to the Court of Appeals of the Commonwealth of Kentucky. Therefore, this contention cannot be a basis for review by certiorari by this Court for the same reasons as previously indicated in response to the petitioner's first contention. Also, it should be noted that the issue, as presented to the state court, was not decided or mentioned in the opinion rendered by the Kentucky Court of Appeals. In such a case, this Court will not undertake to review what the court below did not decide.

Walters v. *City of St. Louis*, 347 U.S. 231 (1954); *Stembridge* v. *Georgia*, 343 U.S. 451 (1952).

Finally, the petitioner attempts to establish that both his contentions present issues which reflect a conflict of decisions between various state and federal courts. However, an analysis of the issues presented and a cursory review of the authorities cited by the petitioner reveal no real conflict insofar as they pertain to the instant petition for writ of certiorari.

SUMMARY

In summary, the respondent submits that the petitioner's application for Petition for Writ of Certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257 (3). After all, the purpose of review by way of certiorari is not to give the defeated party another hearing but to provide a method of correction of judgments which violate federal rights, which is not the case here. Moreover, certiorari jurisdiction is completely discretionary and in the instant case the petitioner has failed to establish that this Court should grant review by certiorari. Supreme Court Rule 19. This is particularly so in the case at bar since the issues raised on appeal to the Kentucky Court of Appeals were not cloaked in the guise of federal questions as they are now presented to this Court and, in any event, the Kentucky Court of Appeals opinion was predicated solely upon adequate, non-federal, state grounds.

The respondent will now endeavor to respond to both of the petitioner's contentions as if they were properly before the Court, even though respondent maintains they are not.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

KENTUCKY REVISED STATUTES 433.290

Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section.

CONSTITUTION OF UNITED STATES, AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abidge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

On January 14, 1970, the Hardin County Grand Jury returned an eight count indictment against the petitioner, John A. Cardin. However, the trial court granted petitioner's motion for severance and he was only tried upon four counts, each involving knowingly receiving stolen property as proscribed by KRS 433.290. At trial the petitioner plead not guilty and testifield in his own behalf. However, a jury in the Hardin Circuit Court returned a verdict finding the petitioner guilty on all four counts and his punishment was fixed by the jury at one year imprisonment in the State Penitentiary on each count. The sentences are to be served consecutively. Judgment was entered accordingly and the petitioner brought an appeal to the Kentucky Court of Appeals alleging four grounds of error. However, the Court affirmed the petitioner's conviction and denied a petition for rehearing that he subsequently filed.

The petitioner is a farmer and businessman who lives near Sonora, in Hardin County, Kentucky. Where he owns and operates three farms, a crop spraying business, and a garage. As a consequence of an investigation conducted by the Kentucky State Police involving certain stolen property, the Hardin County Grand Jury returned an indictment against the appellant which included four counts of knowingly receiving stolen property.

The aforementioned counts involved: (a) a 1965

Chevrolet truck owned by the Yellow Cab U-Drive It Company, Alton Miller owner; (b) a 1970 Chevrolet truck owned by E-Z Haul Company located in Louisville, Kentucky; (c) twenty-four head of Holstein cattle, owned by James Parker; (d) finally, 6000 lbs. of leaf tobacco owned by Albert Parsley.

Police investigation in regard to the above items and their connection with the petitioner centered around four days, the 10th, 11th, 12th and 14th of December, 1970. On Thursday, December 10, 1970, Detective Sgt. Richard McQuown of the Kentucky State Police, in connection with other investigations, went to Sonora to obtain a search warrant for a barn located on the farm owned by the petitioner and where he resided (Farm #1). A subsequent search of this barn established that it housed a certain quantity of leaf tobacco which had been stolen from Albert Parsley. (Respondent's Appendix, hereinafter Res. App., 2a-3a). He also indicated that he had leased the barn two months prior to the investigation to an Edward Jarrett. However, neither the Commonwealth nor the appellant was able to find and produce Mr. Jarrett for trial. (Res. App. 63a-66a).

On the following day, December 11, 1970, after having received certain information by telephone, Detective McQuown, of the Kentucky State Police, went to Edlin's Machine Shop in Elizabethtown, Kentucky, where he found a 1970 Chevrolet truck whose bed had been removed. The truck was identified as belonging toE-Z Haul Rental Company of Louisville, Kentucky. (Res. App. 76a-79a) On the rear of the truck was a

1970 Kentucky farm truck tag which had originally been issued to the petitioner for one of his farm trucks. A lease agreement executed between E-Z Haul and a certain James H. Steele was found in the cab of the truck on the dash. (Res. App. 27a-28a). On the floor of the cab were found two truck tags from the states of Oregon and Wisconsin. (Res. App. 26a). Subsequent information revealed that the petitioner had driven the truck to Edlin's and requested that the chassis be lengthened by five feet (Res. App. 37a-38a, 116a), because the stolen 1965 truck kept breaking down. (Res. App. 39a).

On this same date, Det. McQuown had an airplane pilot fly him over the three farms owned by the Petitioner. (Res. App. 10a-11a). During the course of this aerial surveillance Det. McQuown sighted a portion of the 1965 Chevrolet truck as well as the bed of the 1970 Chevrolet truck. The 1965 Chevrolet truck was found on the farm where the petitioner's son-in-law resided and which was owned by the petitioner. (Farm #2). The bed of this truck had been removed and partly buried by the appellant on the third farm owned by him. Farm #3). (Res. App. 10a-11a). The bed and truck were subsequently identified as that belonging to Alton Miller (Res. App. 102a-103a). The bed of the 1970 truck was discovered on the farm at which the petitioner resided (Farm #1).

When Det. McQuown arrived at the petitioner's residence (Farm #1) on December 12, 1970, he discovered a portion of the truck bed of the 1965 Chev-

rolet truck on fire. At this time they entered into a discussion during which the petitioner told Det. McQuown that he knew the tobacco and truck were stolen. (Res. App. 28a-37a). Furthermore, the petitioner told McQuown that there were a number of stolen cattle grazing nearby on his farm and that there was additional stolen tobacco, the location of which he would reveal on Monday, December 14, 1970. (Res. App. 36a-42a). The petitioner subsequently denied ever having made these statements to Det. McQuown. Following this conversation, Det. McQuown took the petitioner to the State Police Post in Elizabethtown, Kentucky where he was fingerprinted, photographed and then released. The cattle were subsequently identified as those which were stolen from Mr. Parker. (Res. App. 97a-99a).

On December 14, 1970, the appellant took Det. McQuown to a tobacco warehouse at Greensburg where he had previously taken some of the stolen tobacco. This tobacco was subsequently identified along with that located in the barn at the appellant's farm (Farm #1) as that which was stolen from Mr. Albert Parsley. (Res. App. 87a-90a).

During his trial, the petitioner testified that his only connection with the two trucks was through a Mr. James Steele who he knew only on a business basis, over a period of several months. However, neither the Commonwealth nor the petitioner was able to find or produce Mr. Steele as a witness at the trial. The petitioner also testified that although he saw the cattle on his farm, he assumed that they had merely

roamed over from an adjoining farm and was not aware they were stolen. In regard to the 1965 truck, the appellant testified that it was found on one of his farms (Farm #2) where he kept junked vehicles, and that his fences were down in the proximity of where this truck was found and there were tire marks leading in a direction of those vehicles. He testified that he was unaware that there was stolen tobacco in the barn. He also denied knowledge of the truck and its stolen nature. However, Det. McQuown testified that the appellant told him that a Mr. Mouser brought the truck to appellant's farm and appellant cut part of the truck into pieces and buried it. (Res. App. 33a-34a).

As previously noted, the jury returned a verdict of guilty on all four counts and these convictions were thereafter affirmed by the Kentucky Court of Appeals. This petition for writ of certiorari now results.

ARGUMENT

I.

THERE WAS NO VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION UPON THE GROUND THAT THE PROSECUTION ALLEGEDLY FAILED TO PROVE AT TRIAL AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED.

In his appeal to the Kentucky Court of Appeals the petitioner vigorously contended that the Commonwealth failed to prove that the 1970 Chevrolet truck had been stolen from its lawful owners. The foregoing contention was not cloaked at that time with the additional contention of a denial of due process as guaranteed by the 14th Amendment. The respondent respectfully disagrees with the petitioner's argument as is now presented to this Court.

The petitioner was convicted, in a jury trial, of four counts of knowingly receiving stolen property, as denounced by KRS 433.290. The second count of which he stood convicted involved his knowingly receiving a 1970 Chevrolet truck which had been stolen from its lawful owners. On his appeal in state court, he asserted that the Commonwealth's evidence failed to establish that the truck was taken as a result of a larceny. He concluded that an essential element of the offense of knowingly receiving stolen property had not been established. However, the Kentucky Court of Appeals in rejecting this argument stated that, "While the rental company may not have been

aware that the truck had, in fact, been stolen, the jury could infer from all the evidence that such was the case. They did so, and the evidence supports the verdict." (Petitioner's Appendix 1a-2a). The respondent now raises this same issue, but for the first time in the guise of a violation of his right to due process of law as guaranteed by the 14th Amendment. The respondent respectfully disagrees.

Under Kentucky law, the elements of knowingly receiving stolen property, as proscribed by KRS 433.290, are the following:

1. Any person who receives stolen property;

2. Knowing it to be stolen;

3. May be convicted although the thief has not;

4. And possession of any stolen property shall be prima facie evidence of guilt;

5. And finally, venue of the offense must be established. (Russell's Kentucky Practice, Vol. I, Part 3, page 20).

Here, as in the appellate court, the petitioner asserts that when the truck was leased from the rental agency it was not established that the leasee had, at that time, the intent of stealing the property. Of course, if he did, a larceny occurred. On the other hand, if the intent to steal was not present at the time the truck was leased but only arose at some subsequent time, a conversion occurred and the property was not

taken by a "larceny." *Fugate* v. *Commonwealth*, 308 Ky. 815, 215 S.W.2d 1004 (1948).

However, the Commonwealth's evidence established that this truck, although leased, was never returned to its rightful owners and would have been used to transport yet other stolen property, i.e. tobacco, cattle, etc. (Res. App. 39a). Furthermore, the truck was taken by the petitioner to a local garage in order that its truck bed be physically altered without the permission of its rightful owners. (Res. App. 37a-38a). Also, before taking the truck from the farm, the petitioner had the bed of the truck removed from the chassis without the permission of its owners. He also placed on the truck Kentucky truck tags from another truck which he did own. He testified that he did this because the truck in question had no tags of its own and he did not want to drive it on public roads without some kind of truck license on it. However, the Commonwealth's evidence established that at the time the truck was located at the garage by police authorities Wisconsin and Oregon tags for that truck were found in its cab along with the rental agreement between the rental company and a Mr. Steel. (Res. App. 26a-28a). Moreover, the truck was found in the possession of the petitioner and thus was prima facie evidence of the petitioner's guilt of knowingly receiving stolen property. *Deskins* v. *Commonwealth*, Ky., 488 S.W.2d 697 (1972), cert. denied 413 U.S. 902 (1973). It was incumbent *upon the petitioner* at trial to establish the lack of guilty knowledge as to the stolen nature of the property involved and that he legally acquired that property. *Combs* v. *Commonwealth*, Ky., 341 S.W.2d 774 (1961).

Also, it isn't necessary to first establish the guilt of the person who actually stole the property or to prove that the petitioner was in any way connected with the larceny. *Logan* v. *Commonwealth*, Ky., 319 S.W.2d 465 (1959). It is only necessary that the gravamen of the offense, receiving stolen goods with the knowledge that they are stolen, be established. *Grider* v. *Commonwealth*, Ky., 479 S.W.2d 11 (1972).

Thus, the respondent submits that the foregoing evidence was more than sufficient for the jury to conclude that the truck had been stolen as a consequence of a larceny and that the Kentucky Court of Appeals was correct in reaching a similar conclusion. In effect, this issue is merely a question of fact to be determined by the jury from the evidence.

Furthermore, the evidence of scienter on the part of the petitioner, as established by the Commonwealth, was sufficient to present a jury question. *Smith* v. *Commonwealth*, Ky., 495 S.W.2d 770 (1973); *Commonwealth* v. *Wallace*, Ky., 486 S.W.2d 61 (1972); *Russell* v. *Commonwealth*, Ky., 403 S.W.2d 694 (1966); *Clatos* v. *Commonwealth*, 298 Ky. 851, 184 S.W.2d 125 (1945).

The only conclusion that can be drawn is that the Commonwealth's evidence did in fact establish that the truck had been "stolen" and thereafter the petitioner did knowingly receive such stolen property. This being so, the petitioner's present contention is completely without foundation both in law and in fact and does not merit the granting of a petition for writ of certiorari. *Henry*

v. *Mississippi*, 379 U.S. 443 (1965); *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927).

Finally, the petitioner asserts that there is a conflict of decisions concerning the issue at bar and thus certiorari review should be granted. However, for the reasons already given in the jurisdictional statement and in this argument, the respondent submits that there exists no real conflict of decisions in state and/or federal courts pertaining to the issue presented by the petitioner before the Kentucky Court of Appeals or to that issue as it is now presented to this Court with the additional assertion of an alleged denial of the right to due process of law under the 14th Amendment.

ARGUMENT

II.

THE TRIAL JUDGE DID NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO GIVE INSTRUCTIONS LIMITING THE PURPOSE FOR WHICH EVIDENCE PERTAINING TO CERTAIN TOBACCO AND A BURNING TRUCK BED SHOULD BE USED.

In his brief before the Kentucky Court of Appeals, the petitioner asserted that portions of the testimony given by a Commonwealth's witness Det. McQuown, referred to crimes committed by the petitioner other than those for which he was standing trial.

Specifically, the petitioner directs the Court's attention to references made by Det. McQuown to certain tobacco found on the petitioner's farm and the burning bed of the 1970 Chevrolet truck. The petitioner now presents this same issue, as in his first argument, in the guise of an alleged violation of his right to due process of law under the 14th Amendment. The respondent respectfully disagrees and submits that perusal of the testimony in question reveals that the references made by Det. McQuown to the tobacco, other than that which was stolen, and to a burning truck bed do not constitute evidence of other crimes. Therefore, it was not incumbent upon the trial judge to give the instruction which the petitioner felt was required and no violation of a federally protected constitutional right occurred.

The testimony as to the burning truck bed merely established the condition of that truck bed as observed by McQuown when he arrived at the farm. The reference to the tobacco did not indicate that it was stolen. McQuown simply testified that other tobacco was found at the farm. No reference was made by Det. McQuown pertaining to the specific offense of arson or to the stolen nature of the tobacco nor were such references stated or emphasized by the Commonwealth or its other witnesses. Therefore, the respondent submits that this testimony did not constitute evidence of other crimes under Kentucky law and no admonition limiting the purpose for its use was required. *Blakemore* v. *Commonwealth*, Ky., 497 S.W.2d 231, 233 (1973). Likewise, the contention as now presented to this Court cannot be a basis for granting re-

view by writ of certiorari since the alleged violation of federal constitutional rights was not presented to the state circuit or appellate courts for their consideration. Moreover, the Kentucky Court of Appeals in its opinion made no mention or reference to the issue as it was then formulated on appeal. However, there exists no rule, statute or case law in Kentucky which requires an appellate court to rule, in its written opinion, upon every ground urged by an appellant in his brief. In any event, this Court will not undertake to review when the court below did not decide. *Walters* v. *City of St. Louis*, supra: *Stembridge* v. *Georgia*, supra. Also, perusal of the testimony of Det. McQuown, in light of the issue as postulated by the petitioner, establishes that no federal question exists which would predicate this Court granting a review by writ of certiorari. Nor is the petitioner's claim as to a conflict of decision on this issue well taken. Simply stated, no grounds exist for the granting of a writ of certiorari upon this issue.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have not been raised in the courts below and thus may not be a basis for the granting of certiorari review. Moreover, the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. § 1257 (3). Furthermore, the issues presented by the petitioner do not constitute or raise a substantial federal question. Finally, the petitioner has failed to establish that the issues he now presents actually involve any real conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent respectfully requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

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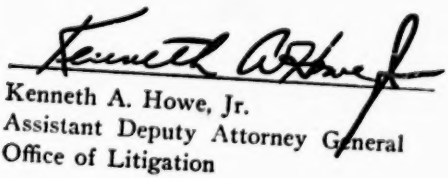
PROOF OF SERVICE

I, Kenneth A. Howe, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1974, I served the petitioner with Brief for Respondent in Opposition, by placing 3 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioner.



Kenneth A. Howe, Jr.
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Office of Litigation